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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
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June 23, 2010

The Honorable Jeff Sessions
Ranking Republican Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Jeff:

I am in receipt of your Tuesday letter. I appreciate your acknowledgement of my efforts to ensure that we have an open and transparent confirmation process. That is the kind of process I would have liked when I was the ranking member and the Committee and we were considering President Bush's nominations of Chief Justice Roberts, Harriet Miers and Justice Alito.

I hope you also agree that actions I have taken both with the nomination last year of Justice Sotomayor and this year with that of Solicitor General Kagan have been successful. We joined in a bipartisan Committee questionnaire. I then did something you and other Republicans refused to do in connection with our requests for information regarding the Roberts and Alito nominations, when I joined with you on a request to the Clinton Library for records regarding Elena Kagan's work during the Clinton administration.

The Clinton Library has fulfilled the commitment made in the May 21 letter from the National Archives to complete its production of both paper records and email records in a timely manner, well in advance of the confirmation hearing. In so doing, the Clinton Library produced more materials than were produced in connection with previous Supreme Court nominations and did so more quickly. The paper records were all produced by June 11, more than two weeks before the start of the hearing, after an extensive search at the Clinton Library. They numbered nearly 90,000 pages, which is more than were produced in connection with either the Roberts or Alito nominations.

The email records were produced last Friday as the National Archives had said they would be. The Clinton Library provided unprecedented access to all emails sent or received by Elena Kagan during her time in the Clinton administration, something that has never been provided for any prior nominee. They extended to more than 80,000 pages.

I also took the extra step of following up on your request for documents from the Department of Defense relating to military recruitment efforts at Harvard. Even though such a request has not been the past practice of the Judiciary Committee in considering nominations, I wrote to ensure that we would have those documents, as well. We have now received them and they represent another unprecedented set of information in our consideration of this nomination.

The search the National Archives has completed for documents related to Elena Kagan is more comprehensive than those previously undertaken for other nominations. In 2005, in connection with the Roberts nomination, we were limited to Reagan Library documents on selected topics. I recall that no Republican joined that request, nor did any Republican protest when it was not timely fulfilled. Further, no Republican Senator complained about documents withheld on personal privacy grounds.

You acknowledge in your recent letter that insisting at this junction on further production of a large sampling of additional emails on which the nominee's name appears or in which she was in the distribution chain is likely to turn up numerous nonresponsive documents. Yet, contrary to the approach of the Democrats in 2005 who sought to ensure that the documents most likely to be relevant would be provided in time for the Roberts hearing, you now seek to continue to search for additional documents not likely to aid in our consideration of the nomination. The Clinton Library's successful production of more than 170,000 pages of documents in a timely fashion has proven the benefit of relying on the search designed and conducted by professional archivists to identify the documents most likely to be relevant and that has yielded the great volume of materials that we have received. As the archivists discussed with our staffs, casting a net for all materials forwarded to her would have distracted from their efforts to produce her files and work product. As I have said, I think the archivists are to be commended for their professionalism.

I do not think we should be using double standards in connection with this nomination. As the general counsel to the National Archives wrote to us: "Consistent with the Presidential records we produced on Chief Justice John Roberts in response to his Supreme Court nomination, we are not providing the Committee with records withheld under the personal privacy restriction." With respect to your concern about the small number of documents that have been withheld on personal privacy grounds, I have no reason not to trust the professional judgment of the archivists, which is consistent with our established practice with respect to past nominations.

As it did in connection with the nomination of Chief Justice Roberts, the Archives did not provide the Committee with presidential records withheld under the personal privacy restriction. During our consideration of the Roberts nomination, no Senator insisted on reviewing the documents withheld by the Reagan Library in order to verify the conclusion of the archivists. We did not do so even though the 2400 pages withheld and 600 pages produced with heavy redactions were a significantly higher percentage of withheld documents than those withheld for this nomination.

The Clinton Library has withheld a far smaller number of documents from the Committee than were withheld by the Reagan Library for the Roberts nomination, despite the production of more than twice as many documents. We have received 170,000 pages of documents related to the Kagan nomination and 1600 pages have been withheld on personal privacy grounds. In connection with the Roberts nomination, we received 79,000 pages of documents and 3000 pages were initially withheld—less than half as many documents were produced and almost twice as many withheld. With respect to the withheld Roberts documents, after the archivists themselves performed a supplementary review, not supported by any Republican, 600 pages were sent to us in heavily redacted form. I believe the smaller amount of documents withheld this time is the product of the hard work of the archivists who from the outset, as they said in their cover letter to us, “made every effort to withhold as little as possible and to provide portions of documents where possible, rather than withholding an entire document.”

Apart from the small number of documents withheld for personal privacy, no documents have been withheld from the Committee on any basis. President Obama has not asserted executive privilege over a single document. With respect to the small number of documents on which President Clinton asserted statutory restrictions against public release under the Presidential Record Act, the Archives provided them to the Committee on the condition that they be designated and treated as “Committee Confidential.” As a result, these documents were not withheld from the Committee. They were produced pursuant to an accommodation never extended to the Committee by the Bush administration with respect to documents withheld from us during our consideration of the nominations of Chief Justice Roberts and Justice Alito.

Of course, these are not the only materials we have available to us in advance of the hearing. The nominee had previously answered the Committee’s extensive bipartisan questionnaire and requests for information in connection with both this nomination and her nomination last year to be the Solicitor General of the United States. In addition, the papers of Thurgood Marshall have long been publicly available and contain her work product from her clerkship with Justice Marshall.

Accordingly, I look forward to our proceeding with the hearing as we discussed, as I announced and which has been noticed to begin on June 28. This is consistent with the timeline we used successfully last year in connection with the nomination of Justice Sotomayor and that I had agreed to with the then Republican chairman in connection with the nomination of Judge Roberts to succeed Justice O’Connor.

Sincerely,


PATRICK LEAHY
Chairman

Looking forward to the hearing / jff